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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Fire Security Electronics & Communications
10 Incorporated,

11 Plaintiff,

12 v.

13 Nicholas Nye, et al.,

14 Defendants.

No. CV-23-02730-PHX-DLR

ORDER

15
16 Pending before the Court is Plaintiff Fire Security Electronics & Communications
17 Incorporated's ("FSEC") Rule 12(b)(6) motion to dismiss Defendant Christopher Boone's
18 counterclaims. The motion is fully briefed, and neither side has requested oral argument.
19 (Docs. 28, 30, 32.) For the following reasons, the motion is denied.

20 **I. Background¹**

21 Boone worked at FSEC from December 2015 to September 2016, and again from
22 March 13, 2017 to February 12, 2023. (¶ 1.) In early 2022, FSEC informed Boone that he
23 would receive a semiannual commission of 0.5% of all revenue invoiced for the Service,
24 Test, and Inspection Departments at FSEC and that he would receive his first commission
25 payment on June 14, 2022. (¶ 5.) Boone earned his first commission on June 14, 2022, but
26 FSEC failed to pay Boone the commission on that date. Instead, FSEC informed Boone
27 that he would receive his commission on June 24, 2022. Again, however, FSEC failed to

28 ¹ This section draws from the allegations contained in Boone's Answer and Counterclaim (Doc. 25), which are accepted as true for the purposes of this order.

1 pay Boone the commission. (¶¶ 9–10.) FSEC reiterated that Boone would be paid, but
 2 continued to push out the date on which he would receive his commission until December
 3 2022. (¶ 10.) Boone alleges that Curt Thurman, FSEC’s Chief Executive Officer, reassured
 4 Boone on at least ten occasions that Boone would receive his commission. (¶ 11.)

5 On December 31, 2022, Boone earned his second commission. (¶ 12.) FSEC again
 6 failed to pay Boone his commission. On January 30, 2023, Boone sent an email to Thurman
 7 requesting the payout of his commissions in the sum of \$17,021.93. (¶ 17.) On January 31,
 8 2023, Thurman acknowledged receipt of Boone’s email and stated, “I will let accounting
 9 confirm the numbers to make sure those are the correct totals as there maybe [sic] numbers
 10 that may need to be included in 2022. As I have mentioned to you before, you will receive
 11 the dollars you are due when the final numbers for the year were accounted for. I will have
 12 a payout plan together for you soon.” (¶18.) On February 13, 2023, FSEC terminated
 13 Boone. (¶ 19.) Boone alleges FSEC has yet to pay Boone the commissions owed to him
 14 for 2022. (¶ 13.)

15 On February 6, 2024, Boone filed the following counterclaims against FSEC:
 16 (1) breach of contract; (2) breach of the implied covenant of good faith and fair dealing;
 17 (3) unjust enrichment; and (4) treble damages pursuant to A.R.S. § 23-355. (Doc. 25.)
 18 FSEC has moved to dismiss Boone’s counterclaims under Federal Rule of Civil Procedure
 19 12(b)(6), arguing that Boone’s contract claims are time barred and that Boone’s unjust
 20 enrichment claim fails as a matter of law because he admits that a contract exists between
 21 Boone and FSEC. (Doc. 28.)

22 II. Legal Standard

23 To survive a Rule 12(b)(6) motion to dismiss for failure to state a claim, “a
 24 complaint must contain sufficient factual matter, accepted as true, to state a claim to relief
 25 that is plausible on its face.” *Zixiang Li v. Kerry*, 710 F.3d 995, 999 (9th Cir. 2013). A
 26 claim is facially plausible when the plaintiff pleads facts that “allow the [C]ourt to draw
 27 the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft*
 28 *v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted). “In evaluating a Rule 12(b)(6)

1 motion, the [C]ourt accepts the complaint’s well-pleaded factual allegations as true and
 2 draws all reasonable inferences in the light most favorable to the plaintiff.” *Adams v. U.S.*
 3 *Forest Srvcs.*, 671 F.3d 1138, 1142–43 (9th Cir. 2012).

4 A Rule 12(b)(6) motion to dismiss for failure to state a claim “can be granted only
 5 if it appears beyond doubt that the plaintiff can prove no set of facts in support of his or her
 6 claim.” *Jablon v. Dean Witter & Co.*, 624 F.2d 677, 682 (9th Cir. 1980). “When a motion
 7 to dismiss is based on the running of the statute of limitations, it can be granted only if the
 8 assertions of the complaint, read with the required liberality, would not permit the plaintiff
 9 to prove the statute was tolled.” *Id.*

10 **III. Analysis**

11 Starting first with FSEC’s statute of limitations argument: Under Arizona law,
 12 actions for breach of an oral or written employment contract and for unpaid wages must be
 13 commenced within one year after the cause of action accrues. A.R.S. § 12-541; *Redhair v.*
 14 *Kinerk, Beal, Schmidt, Dyer & Sethi, P.C.*, 183 P.3d 544, 550 (Ariz. Ct. App. 2008)
 15 (explaining that unpaid wage claims arise under A.R.S. § 23-355 and, as such, have a one-
 16 year statute of limitations under A.R.S. § 12-541(3)). A cause of action does not accrue
 17 until a party “knows or, in the exercise of reasonable diligence, should know, the facts
 18 underlying the cause [of action].” *Gust, Rosenfeld & Henderson v. Prudential Ins. Co. of*
 19 *Am.*, 898 P.2d 964, 966 (1995).

20 FSEC argues that “Boone’s claim for commissions earned on June 14, 2022,
 21 accrued by no later than the day following that pay period—June 16, 2022” and that his
 22 “claim for commissions earned on December 31, 2022, arose no later than December 31,
 23 2022.” Thus, Boone’s claims for commissions expired, respectively, June 16, 2023, and
 24 December 31, 2023. As Boone’s Counterclaims were not filed until February 6, 2024,
 25 Boone’s breach of contract and breach of the covenant of good faith and fair dealings
 26 claims are time barred. (Doc. 28 at 5–6.) The Court disagrees.

27 Drawing all reasonable inferences in the light most favorable to Boone, it does not
 28 appear beyond doubt that Boone’s claims are time-barred. Given Thurman’s assurances

1 throughout 2022 and early 2023 that Boone would be paid his commissions, it is plausible
2 that Boone did not discover the facts underlying his breach of contract and bad faith claims
3 until February 13, 2023—the day FSEC terminated Boone without paying him his
4 commissions. *See Gillard v. Good Earth Power AZ LLC*, No. CV-17-01368-PHX-DLR,
5 2019 WL 1280946, at *6 (D. Ariz. Mar. 19, 2019) (“An employee is deemed to have
6 discovered an employer’s breach of contract with respect to payment of wages when the
7 employee learns that it will not receive those wages.”). Accepting Boone’s allegations as
8 true, it is plausible that Boone and Thurman orally agreed to defer Boone’s commissions
9 to a later date and that Boone first discovered that he would not be receiving those
10 commissions the day he was terminated without payment. *Id.* (“[A] reasonable juror could
11 find that Plaintiffs did not discover that they would not receive their deferred wages until
12 the close of the pay period following termination.”).

13 Even if Boone’s commissions had not been deferred, Boone has plausibly alleged a
14 tolling of the statute of limitations. “Arizona courts have recognized equitable exceptions
15 to the application of the statute [of limitations] when necessary to prevent injustice. One
16 such exceptions applies when a defendant induces a plaintiff to forbear filing suit.” *Nolde*
17 *v. Frankie*, 964 P.2d 477, 481 (Ariz. 1998). To establish equitable tolling, a plaintiff must
18 show that the defendant engaged in affirmative conduct intended to cause the plaintiff’s
19 forbearance, the defendant’s conduct actually caused the plaintiff’s failure to file a timely
20 action, the defendant’s conduct reasonably could be expected to cause forbearance, and the
21 plaintiff brought the action within a reasonable time after termination of the objectionable
22 conduct. *Id.* Boone has plausibly alleged a basis for equitable tolling. Thurman’s
23 assurances—repeated on at least ten occasions—that Boone would receive his
24 commissions plausibly constitutes affirmative conduct intended to prevent or delay Boone
25 from pursuing legal action. Boone reasonably relied on such assurances up until he was
26 terminated in February 2023, and then filed claims for these commissions within one year
27 of his termination. As such, the Court finds that Boone has alleged breach of contract and
28 bad faith claims that plausibly fall within the statute of limitations and, therefore, will not

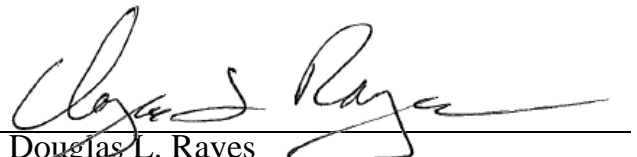
1 dismiss these claims.

2 FSEC next contends that Boone's unjust enrichment claim fails as a matter of law
3 because Boone has alleged an employment relationship with FSEC based on an at-will
4 employment contract, and where there is a specific contract that governs the relationship
5 of the parties, the doctrine of unjust enrichment has no application. (Doc. 28 at 5.) The
6 Court disagrees.

7 FSEC is correct that to recover on a claim of unjust enrichment, a plaintiff must
8 establish the *absence* of a legal remedy and that where a plaintiff possesses a remedy based
9 on breach of contract, the plaintiff is precluded from recovering on a claim of unjust
10 enrichment. *See Trustmark Ins. Co. v. Bank One, Ariz. NA*, 48 P.3d 485, 491 (Ariz. Ct.
11 App. 2002); *Brooks v. Valley Nat'l Bank*, 548 P.2d 1166, 1170 (Ariz. 1976). "That said, a
12 plaintiff is not barred from pleading unjust enrichment as an alternative theory to a breach
13 of contract claim." *Kamin Health LLC v. 4D Global LLC*, No. CV-23-01491-PHX-DLR,
14 2024 WL 1796085, at *3 (D. Ariz. Apr. 25, 2024); *see also Adelman v. Christy*, 90 F. Supp.
15 2d 1034, 1046 (D. Ariz. 2000) ("The mere existence of a contract governing the dispute
16 does not automatically invalidate an unjust enrichment alternative theory of recovery. A
17 theory of unjust enrichment is unavailable only to a plaintiff if that plaintiff has already
18 *received* the benefit of [his] contractual bargain."). Although Boone may not recover for
19 both breach of contract and unjust enrichment, he can plead both theories of liability.
20 Accordingly,

21 **IT IS ORDERED** that FSEC's Motion to Dismiss Counterclaims (Doc. 28) is
22 **DENIED**.

23 Dated this 9th day of July, 2024.

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26 
27 Douglas L. Rayes
28 Senior United States District Judge